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No. 02-1265

Supreme Court, U.S.
FILED
MAY 30 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EXXONMOBIL GAS MARKETING COMPANY, A DIVISION OF EXXON MOBIL CORPORATION, *et al.*
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICI CURIAE* NATURAL GAS SUPPLY ASSOCIATION AND INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

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May 30, 2003

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

10 pp

QUESTIONS PRESENTED *

1. Whether the rule mandating strict construction of exemptions from the Federal Energy Regulatory Commission's jurisdiction under the Natural Gas Act applies to offshore transportation pipelines.

2. Whether a pipeline that obtained a certificate of public convenience and necessity from the Commission to provide transportation service may abandon that jurisdictional service upon reclassification of its facilities without any findings by the Commission that abandonment is in the public interest.

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* *Amici curiae* Natural Gas Supply Association and Independent Petroleum Association of America adopt the questions presented as framed by Petitioners.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICI CURIAE*	1
STATEMENT	2
REASONS FOR GRANTING THE PETITION	3
CONCLUSION	6

TABLE OF AUTHORITIES

CASES Page

Enron Gulf Coast Gathering, Ltd. Partnership, 95 F.E.R.C. (CCH) ¶ 61,318 (2001) 4

ExxonMobil Gas Marketing Co., a Division of Exxon Mobil Corp. v. Federal Energy Regulatory Comm'n, 297 F.3d 1071 (D.C. Cir. 2002) 3

Interstate Natural Gas Co. v. Federal Power Comm'n, 331 U.S. 682 (1947) 5

Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corp., 103 F.E.R.C. (CCH) ¶ 61,177 (2003) 4-5

Transcontinental Gas Pipe Line Corp., 97 F.E.R.C. (CCH) ¶ 61,298 (2001) 4

OTHER AUTHORITIES

Energy Information Administration, *Annual Energy Outlook* 140 (2003) 2

Energy Ventures Analysis, Inc., *Fuelcast: Short-Term Overview* 3-29 (2003) 2

Minerals Management Service, *Outer Continental Shelf Petroleum Assessment* 5 (2000) 3

Office of Fossil Energy, *Environmental Benefits of Advanced Exploration and Production Technology* 34 (1999) 2

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INTEREST OF *AMICI CURIAE* [1]

The Natural Gas Supply Association is an incorporated not-for-profit trade association representing the interests of natural gas producers. The Natural Gas Supply Association represents the majority of the large integrated and independent companies that produce and market domestic natural gas.

[1] No counsel for a party authored any portion of this brief, nor did any person or entity other than the *amici curiae* make any monetary contribution to the preparation or submission of the brief.

The Natural Gas Supply Association encourages expanded use of natural gas and a regulatory climate that fosters competitive markets.

The Independent Petroleum Association of America is an incorporated not-for-profit trade association representing the interests of thousands of independent oil and natural gas producers across the United States. Independent producers drill 85% of the wells in the United States, produce 65% of the country's natural gas, and produce 40% of domestic oil supplies.

STATEMENT

Natural gas produced on the Outer Continental Shelf ("OCS") in the Gulf of Mexico contributes over 5 trillion cubic feet per year to domestic natural gas supplies. Energy Information Administration, *Annual Energy Outlook* 140 (2003). This represents over twenty-five percent of current U.S. supplies. *Id.* Seventy percent of existing OCS production remains in non-deepwater areas of the OCS. Energy Ventures Analysis, Inc., *Fuelcast: Short-Term Overview* 3-29 (2003).

The potential future contribution of OCS supplies toward meeting increased natural gas demand is vast. Potential reserves in deepwater areas of the OCS are extensive. New deepwater production technology also may extend the economic life of existing OCS production in shallow waters.

Substantial expenditures are required for offshore development. An average offshore well costs $4.3 million. Office of Fossil Energy, *Environmental Benefits of Advanced Exploration and Production Technology* 34 (1999). Large offshore projects can cost more than a billion dollars. As additional offshore producing areas are developed, the contribution made by the OCS to the overall supply of natural gas will remain significant. An average of 200 Tcf of

estimated recoverable resources exists in the Gulf of Mexico. Minerals Management Service, *Outer Continental Shelf Petroleum Assessment* 5 (2000).

Offshore exploration and production activities depend in large part on the availability of economical natural gas pipeline transportation infrastructure. The Federal Energy Regulatory Commission's ("FERC") mandate is to ensure that such infrastructure exists and to establish rates for use of that infrastructure that are just and reasonable; however, in the orders that are the subject of the petition in this case, FERC failed to exercise its mandate. FERC determined that it should "reclassify" as a "gathering" facility exempt from its Natural Gas Act ("NGA") jurisdiction the largest part of an offshore natural gas transportation pipeline long regulated by FERC, and it permitted the Sea Robin pipeline to terminate its existing interstate jurisdictional transportation service without the public-interest inquiry required by the NGA's abandonment provisions. In upholding the FERC's actions, the D.C. Circuit disregarded both the statute FERC administers and the decisions of this Court, for the reasons explained in detail by the petitioners. The consequences of this decision, if not reversed by this Court, will inhibit substantially the economic development of OCS natural gas resources.

REASONS FOR GRANTING THE PETITION

Because petitioners have amply demonstrated the error of the D.C. Circuit decision and its inconsistency with the plain meaning of the statute and judicial precedent, this brief will emphasize the importance of this Court's immediate review of the questions presented. Put simply, the D.C. Circuit's decision in *ExxonMobil Gas Marketing Co., a Division of Exxon Mobil Corp. v. Federal Energy Regulatory Comm'n*, 297 F.3d 1071 (D.C. Cir. 2002) ("Sea Robin decision") threatens to undermine OCS development and to disrupt the

settled reliance interests of parties investing billions of dollars in offshore development ventures, to the ultimate detriment of producers and consumers alike.

For thirty years, the Sea Robin system was subject to rate regulation by FERC and its predecessor. Long-term investment decisions were made by producers against this settled regulatory background. Much of the production attached to the Sea Robin system is from mature producing areas that have no economically viable alternative source of transportation service.

Based on a flawed interpretation of the jurisdictional and abandonment provisions of the Natural Gas Act, the court of appeals upset settled expectations of producers and established a precedent that now releases thousands of miles of OCS pipeline from rate controls, paving the way for pipeline owners to exercise market power over captive OCS shippers.

The issue presented by this case is not limited to one interstate pipeline system. The consequences of this decision are not confined to the litigants themselves, or to the industry in which they function. In reliance on the Sea Robin precedent, FERC has reversed longstanding past jurisdictional determinations in other proceedings involving other traditionally regulated interstate pipeline systems. *See, e.g., Transcontinental Gas Pipe Line Corp.*, 97 F.E.R.C. (CCH) ¶ 61,298 (2001); *Enron Gulf Coast Gathering, Ltd. Partnership*, 95 F.E.R.C. (CCH) ¶ 61,318 (2001). Additional regulated offshore transportation systems can be expected to seize the market power the Sea Robin policy confers upon them.

For its part, FERC has recognized recently that exorbitant charges for offshore gathering can frustrate FERC's ability to regulate jurisdictional interstate transportation. *Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corp.*, 103

F.E.R.C. (CCH) ¶ 61,177, at P 21 (2003). FERC has acknowledged that such tactics ultimately harm consumers and that the related distortion of production and investment decisions also can be contrary to the public interest. Notwithstanding these findings, FERC continues to adhere to its flawed Sea Robin policy, compounding these adverse consequences.

The D.C. Circuit's evisceration of the rule that exemptions from the FERC's NGA jurisdiction are strictly construed, *see Interstate Natural Gas Co. v. Federal Power Comm'n*, 331 U.S. 682, 690-91 (1947), and the attendant uncertainty as to the scope of FERC's jurisdiction over OCS pipelines, not only upset settled reliance interests, but also create untenable investment risk that will affect future production. Producers may forego much highly capital-intensive OCS investment because of the significant risk that, after the investment is made, pipelines that are free of NGA rate regulation will be able to charge monopoly prices to bring natural gas to shore. Until this Court resolves the dispute over the scope of FERC NGA jurisdiction, OCS production and investment decisions will take place in a climate of regulatory uncertainty, which is inimical both to the nation's economy and its energy security.

The optimization of offshore producing reserves depends on the availability of economical transportation service. The orders that are addressed in the petition place in jeopardy future OCS production on traditionally regulated interstate pipeline systems, in a manner that is neither contemplated nor countenanced by the Natural Gas Act. This Court must resolve the fundamental issues of FERC regulatory authority on the OCS presented by this case.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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